

October 20, 2014

Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pai  
Commissioner Michael O’Rielly  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

**Re: Comcast - Time Warner Cable, MB Docket No. 14-57**

Dear Chairman Wheeler and Commissioners,

The undersigned professors of antitrust law and economics submit this letter to the Federal Communications Commission (“FCC” or “Commission”) to assist the Commission in its review of the proposed merger between Comcast Corporation (“Comcast”) and Time Warner Cable, Inc. (“Time Warner”).<sup>1</sup> The Commission must make a determination of whether the proposed transaction would serve “the public interest, convenience, and necessity.”<sup>2</sup> We note that the FCC undertakes a competitive analysis in the public interest similar to, but distinct<sup>3</sup> from, the traditional antitrust analysis undertaken by the Department of Justice (“DOJ Antitrust”) and the Federal Trade Commission (“FTC”). For the reasons we explain below, we believe that the merger should be blocked in its entirety because it would substantially lessen competition in violation of section 7 of the Clayton Act and is not in the public interest.

In this letter, we analyze four issues that, when taken together, require the Commission to block the merger:

-- First, we address important market definition issues. We consider the critically important national market for broadband distribution of content, and in so doing, we draw upon a highly relevant precedent: the *AT&T/MediaOne* transaction in 2000, in which the Department of Justice prevented the merging parties from combining broadband assets that would, like the current transaction, have given them roughly 40 percent of the national market for broadband distribution of content. On the consumer-facing side of the market, we address issues of

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<sup>1</sup> Applications and Public Interest Statement, In re Applications of Comcast Corporation and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, FCC, MB Docket No. 14-57 (Apr. 8, 2014) [hereinafter Comcast-TWC Public Interest Statement].

<sup>2</sup> Section 310(d) of the Communications Act of 1934, 47 U.S.C. § 310(d).

<sup>3</sup> See, e.g., *In re Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, 26 F.C.C.R. 4238, 4248, ¶ 24 (2011).

switching costs and potential entry into local broadband access markets, and establish that neither competition from existing DSL providers nor credible entry threats would be effective to discipline the merged firm from engaging in anti-competitive behavior. We also reject claims that either mobile or satellite-based broadband should be included in the relevant market. And we point out that the parties' "no overlap, no problem" argument, if accepted, would lead to the conclusion that the antitrust laws would permit one party to own the dominant cable provider in every local market in the United States. Such a notion, with no limiting principle, simply cannot stand.

-- Second, we address the long-term competitive threat to the merging parties' cable business presented by online video distributors ("OVDs"), and show that the merger would significantly enhance the Applicants' power to foreclose this important competition, resulting in fewer choices for consumers.

-- Third, we examine the parties' claimed efficiencies and conclude that they are inadequate under case law and the 2010 DOJ Antitrust/FTC Horizontal Merger Guidelines ("2010 Merger Guidelines") to offset the competitive harm threatened by the merger.

-- Finally, we explain why behavioral remedies are insufficient to prevent harm to competition and consumers and conclude that the merger should be blocked in its entirety under the Clayton Act and the Communications Act of 1934.

## **I. Market Definition Issues**

The proposed merger would affect a wide variety of markets. We focus here on the merger's potential impact on a national market for broadband distribution of content, a market with enormous importance for the future of competition in video programming and distribution.

### *A. The State of Broadband Competition*

FCC Chairman Wheeler recently explained the importance of broadband in his speech "The Facts and Future of Broadband Competition."<sup>4</sup> The stakes are high, as Chairman Wheeler noted that "high-speed connections are crucial not only for the kind of innovation that will educate our children and deliver quality health care, but also improve energy efficiency, fill the employment ranks, and maintain the United States as the world's innovation leader for the 21st Century."<sup>5</sup> Competition in broadband creates a virtuous circle in which "the better the available broadband performance, the more that edge providers will take advantage of that performance

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<sup>4</sup> Tom Wheeler, Remarks, FCC, The Facts and Future of Broadband Competition (Sept. 4, 2014), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2014/db0904/DOC-329161A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf).

<sup>5</sup> *Id.* at 2.

with new applications, which in turn will drive more investment to meet that demand for next-generation broadband.”<sup>6</sup>

Unfortunately, the dream of real broadband competition has not been realized in the present marketplace. Chairman Wheeler said that “[a] 25 Mbps connection is fast becoming “table stakes” in 21st century communications. Today about 80 percent of American homes have access to a broadband connection that delivers 25 Mbps or better,”<sup>7</sup> which he later described as “the essential infrastructure for 21st century economics and democracy.”<sup>8</sup> In so doing, the Chairman cast substantial doubt on Applicants’ claim that slow DSL service and mobile and fixed wireless service belong in the relevant market with cable broadband.<sup>9</sup> He said “[t]raditional DSL is just not keeping up, and new DSL technologies, while helpful, are limited to short distances. Increasing copper’s capacity may help in clustered business parks and downtown buildings, but the signal’s rapid degradation over distance may limit the improvement’s practical applicability to change the overall competitive landscape.”<sup>10</sup> As to wireless, the Chairman stated that while “[w]e have great hopes for wireless as a potential substitute for fixed broadband connections, . . . today it seems clear that mobile broadband is just not a full substitute for fixed broadband, especially given mobile pricing levels and limited data allowances.”<sup>11</sup>

*New Entry.* Other high-speed alternatives are not now a significant competitive constraint on cable broadband. At present, Google Fiber has been deployed in only three markets and Google’s national market presence in broadband is tiny.<sup>12</sup> Meanwhile, incumbent cable operators support lobbying efforts to limit the potential growth of Google Fiber and other fiber entry – such as municipal broadband – across the country.<sup>13</sup>

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<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.* at 4. See also, Jon Brodtkin, *Sorry, AT&T and Verizon: 4Mbps isn’t fast enough for “broadband”* — “FCC chairman says Americans shouldn’t subsidize Internet service under 10Mbps,” Arstechnica (Sept 17 2014) <http://arstechnica.com/business/2014/09/sorry-att-and-verizon-4mbps-isnt-fast-enough-for-broadband/>.

<sup>9</sup> Wheeler, *supra* note 4 at 3-5.

<sup>10</sup> *Id.* at 4-5.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> <https://fiber.google.com/cities/>.

<sup>13</sup> Jon Brodtkin, *Who wants competition? Big cable tries outlawing municipal broadband in Kansas*, Arstechnica (Jan. 31, 2014), <http://arstechnica.com/techpolicy/2014/01/who-wants-competition-big-cable-tries-outlawing-municipal-broadband-in-kansas/>.

Chairman Wheeler also painted a pessimistic view of competitive alternatives in the near term. He stated, “These gigabit developments are positive, but they are not yet pervasive. Looking across the broadband landscape, we can only conclude that, while competition has driven broadband deployment, *it has not yet done so in a way that necessarily provides competitive choices for most Americans.*”<sup>14</sup> As a result, the Chairman stated, “cable companies provide the overwhelming percentage of high-speed broadband connections in America. Industry observers believe cable’s advantage over DSL technologies will continue for the foreseeable future.”<sup>15</sup> Thus, for Americans seeking broadband at what Chairman Wheeler called “table stakes” speeds, cable is often the only alternative.

#### B. *National Market for Broadband Content Distribution*

Distribution of video content over the Internet is among the many important uses of broadband, and the national market for broadband distribution of content over the Internet is the market that would be most profoundly affected by the proposed merger. This market was previously recognized by the U.S. Department of Justice in *AT&T/MediaOne*, a precedent remarkably similar to the current proposed deal. In that transaction, AT&T owned a controlling interest in broadband provider Excite@Home. Excite@Home at the time had exclusive contractual rights to offer residential broadband service for cable providers AT&T, Comcast, Cox, and others. AT&T sought to merge with cable provider MediaOne, which owned a substantial interest in Road Runner, which had exclusive contractual rights to offer residential broadband service for cable providers MediaOne and Time Warner.<sup>16</sup> Together, MediaOne and Road Runner controlled approximately 60 percent of residential cable broadband service, and cable broadband constituted approximately 70 percent of broadband service, so the merged entity would have controlled approximately 40 percent of residential broadband service.<sup>17</sup>

Because of the merger’s potential anticompetitive effect on the national market “for aggregation, promotion and distribution of residential broadband content,” the Antitrust Division refused to permit the merger to go forward unless the parties divested one of the cable broadband services. The Department’s Complaint stated that:

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<sup>14</sup> Wheeler, *supra* note 4 at 4.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> Press Release, Dept. of Justice, Justice Department Requires AT&T To Divest Mediaone’s Interest In Road Runner Broadband Internet Access Service (May 25, 2000), [http://www.justice.gov/atr/public/press\\_releases/2000/4829.htm](http://www.justice.gov/atr/public/press_releases/2000/4829.htm).

<sup>17</sup> Complaint, *United States v. AT&T*, No. 1:00-cv-01176, 12-13 ¶ 34 (D.D.C. May 25, 2000) [hereinafter AT&T Complaint].

Through the proposed merger, concentration in the market for aggregation, promotion, and distribution of residential broadband content would be substantially increased. . . . Through its control [of both cable broadband services, the merging party] would substantially increase its leverage in dealing with broadband content providers, enabling it to extract more favorable terms for such services . . . and [its] ability to affect the success of individual content providers also could be used to confer market power on individual content providers [it] favored.<sup>18</sup>

Remarkably, the Road Runner broadband assets in question in 2000 remain Time Warner Cable's to this day, while AT&T's broadband assets were subsequently transferred to Comcast.<sup>19</sup> Thus, the proposed Comcast/Time Warner Cable merger would combine the very broadband assets that DOJ blocked from combining in 2000.

The national residential broadband market identified by the Department of Justice in 2000<sup>20</sup> is even more important today, given the enormous increase in content, data, and commerce delivered and conducted over the Internet in the intervening years. Chairman Wheeler has stressed that the “future is built on high-speed, competitive broadband choice for both consumers and companies.”<sup>21</sup> In noting “that meaningful competition for high-speed wired broadband is lacking” Chairman Wheeler has stressed that protecting competition in broadband would allow consumers “to take advantage of today’s new services, and to incentivize the development of tomorrow’s innovations.”<sup>22</sup>

*C. The Parties’ “No Overlap, No Problem” Defense” is Unsound and Goes Against Fundamental Antitrust Principles*

The merging parties’ core claim is that, because there is no direct overlap in their cable and broadband service areas, they compete in different markets, and there is therefore no competition problem with the merger. Such a claim is fundamentally at odds with antitrust law principles. It overlooks the serious anticompetitive harm that can result from substantial

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<sup>18</sup> *Id.* at 2.

<sup>19</sup> Comcast acquired MediaOne’s direct and indirect interest in Road Runner, which eventually became Time Warner Cable. In 2006, Comcast completed the unwinding of its ownership interest in Time Warner Cable when Comcast and Time Warner bought Adelphia’s cable assets and engaged in a system swap.

<sup>20</sup> The AT&T divestiture remedy in 1982 also was based on a national market. *See United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982).

<sup>21</sup> Wheeler, *supra* note 4 at 7.

<sup>22</sup> *Id.* at 1.

increases in national market share even without increased concentration in local markets. The fact that cable companies generally do not compete in their local service areas (whether by agreement or by accident) cannot serve as a basis for foregoing further antitrust analysis: indeed, if it were otherwise, the antitrust laws would allow the formation of a single cable company serving virtually the entire United States, a result that would be completely at odds with sound antitrust enforcement.

We note that the Commission has referred to the absence of overlap in local service areas in approving certain past cable mergers.<sup>23</sup> Those precedents do not justify ignoring the very significant increase in concentration in the national residential broadband market that would result from the present merger. Those past decisions did not present the primary competitive concern here (also present in *AT&T/MediaOne*): the possibility of a single national firm with dominant MVPD holdings being in a position to foreclose distribution of online video to more than 40 percent of residential broadband customers. The 2010 DOJ/FTC Horizontal Merger Guidelines make clear that the determination of the relevant market for merger analysis is affected by consideration of where competitive effects are likely to occur.<sup>24</sup> To ignore this market would be fundamentally inconsistent with the approach to merger analysis undertaken by the federal antitrust agencies.<sup>25</sup>

## **II. Online Video Distribution Threatens the Applicants' Cable and Broadband Businesses, and the Merger Would Substantially Increase Comcast's Incentive and Ability to Harm Competition**

### *A. The Proposed Merger Increases Comcast's Incentive to Harm OVDs*

Online video distributors ("OVDs") such as Netflix, Hulu and Amazon Prime provide a number of services that compete with cable providers (*e.g.*, video on demand and online products). The Commission has recognized this threat, noting that MVPDs that are vertically integrated with ISPs "have incentives to interfere with the operation of third-party Internet-based

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<sup>23</sup> *In re Applications Filed for Transfer of Control of Insight Commc'ns Co. to Time Warner Cable Inc.*, 27 F.C.C.R. 497 (2012); *In re Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Commc'ns Corp. (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelphia Commc'ns Corp. (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corp. (Subsidiaries), Assignees and Transferees*, 21 F.C.C.R. 8203 (2006).

<sup>24</sup> 2010 Horizontal Merger Guidelines § 4.

<sup>25</sup> Section 7 of the Clayton Act states, "any activity affecting commerce *in any section of the country*, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly" (emphasis added).

services that compete with the providers' revenue-generating . . . pay-television services.”<sup>26</sup> The proposed merger would substantially increase the power of the merged firm to hamper competition from OVDs.

In *Comcast/NBCU* the Antitrust Division stated that, even though Comcast presently “faces little video programming distribution competition,” its “documents consistently portray the emergence of OVDs as a significant competitive threat.”<sup>27</sup> In light of the threat that OVDs pose to its existing market power, the Antitrust Division alleged in its Complaint that “*Comcast has an incentive to encumber . . . the development of nascent distribution models and the business models that underlie them.*”<sup>28</sup>

Comcast has acknowledged – tellingly – that its proposed acquisition of Time Warner Cable is, in substantial part, a response to the competitive threat that it perceives from OVDs.<sup>29</sup> Due to their high, fixed content acquisition costs, OVDs require nation-wide access to consumers via broadband providers such as Comcast and Time Warner. The incentive to act anti-competitively against unaffiliated OVDs, which existed pre-merger, will be greater based on the increased market power that the combined firm would have against incipient threats. Comcast will have an increased incentive because any possible customer diversion from OVDs on TWC’s broadband to TWC’s MVPD can now be captured by Comcast’s NBCU content and video on demand and affiliated OVD offerings.

#### B. *The Proposed Merger Increases Comcast’s Ability to Harm OVDs*

The Justice Department recognized in *AT&T/MediaOne* that, after the merger, AT&T could use its leverage in residential broadband to disfavor broadband content distributors. As the DOJ Complaint explained, “AT&T would substantially increase its leverage in dealing with broadband content providers, enabling it to extract more favorable terms for such services. AT&T’s ability to affect the success of individual content providers also could be used to confer market power on individual content providers favored by AT&T.”<sup>30</sup> As a result, AT&T could make it more difficult through its anti-competitive conduct for content providers to undertake both quality and cost based investments in broadband content.<sup>31</sup> The vulnerability of online

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<sup>26</sup> *In re Preserving the Open Internet*, 25 F.C.C.R. 17905, 17916 ¶ 22 (2010).

<sup>27</sup> Compl.at ¶¶ 9, 36, *U.S. v. Comcast* (D.D.C. 2011) (No. 1:11-cv-00106).

<sup>28</sup> *Id.* ¶ 54 (emphasis added).

<sup>29</sup> Comcast-TWC Public Interest Statement, *supra* note 1, 1-2, 4-5; Declaration of Dr. Gregory L. Rosston and Dr. Michael D. Topper, *An Economic Analysis of the Proposed Comcast – Time Warner Cable Transaction* (April 8, 2014), ¶¶ 9, 51, 80, 83 [hereinafter Rosston Topper Decl.].

<sup>30</sup> AT&T Complaint, *supra* note 17, ¶ 3.

<sup>31</sup> *Id.* at ¶ 34.

content distributors to firms with market power in the national broadband content distribution market identified in *AT&T/MediaOne* remains today in significantly heightened form.

By increasing Comcast's leverage over OVDs, the merger, if allowed, would exacerbate competitive concerns similar to those in *AT&T/MediaOne*. Enhanced leverage would increase the likelihood of Comcast's exclusionary conduct, and increase the likelihood that other broadband carriers would follow in kind.

A simple example illustrates how the merger would give Comcast increased power to harm competition. Comcast today asserts the right to charge OVDs directly or indirectly to interconnect with Comcast's last-mile network in order to reach its residential customers. In other words, Comcast demands payment from OVDs to deliver to Comcast's residential broadband customers the online content that those customers request. Comcast can extract payment for interconnection by allowing the routes into its network to congest, blocking or degrading an OVD's access to a substantial share of its current or potential customers. There have been episodes of sustained congestion on Comcast's network.<sup>32</sup> When companies have paid to improve congestion issues, the congestion problems have gone away.<sup>33</sup>

But whether or not Comcast has already exercised the power to congest interconnection points, Comcast effectively has a monopoly over access to its customers. OVDs have no suitable alternative for reaching them, and there is in place today no regulatory mechanism limiting the price that Comcast can charge OVDs directly or indirectly for interconnection. The merger would increase Comcast's share of residential broadband customers to nearly forty percent, and this added size would give Comcast the power to increase the price for interconnection, and in so doing to raise the costs of its online video rivals.

The merged firm would have available additional enhanced means to foreclose downstream OVDs. Among the tactics the DOJ has found that Comcast could undertake to leverage its gatekeeper position against rivals, is to provide "priority to non-OVD traffic on its network, thus adversely affecting the quality of OVD services that compete with Comcast's own MVPD or OVD services."<sup>34</sup> In addition to priority over its network, Comcast also could give affiliated content priority on the set-top box. In *AT&T/MediaOne*, the Antitrust Division

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<sup>32</sup> Drew FitzGerald and Shalini Ramachandran, *Netflix-Traffic Feud Leads to Video Slowdown*, Wall Street Journal (Feb. 24, 2014), <http://online.wsj.com/news/articles/SB10001424052702304899704579391223249896550>.

<sup>33</sup> Chloe Albanesius, *Netflix Slams ISPs, Calls for Strong Net Neutrality Rules*, PCMag (Mar. 21, 2014), <http://www.pcmag.com/article2/0,2817,2455210,00.asp>.

<sup>34</sup> Competitive Impact Statement, *United States v. Comcast Corp., General Electric Co., and NBC Universal, Inc.*, Case No. 1:11-cv-00106, at 37 (D.D.C. Jan. 18, 2011).

concluded that placement on the “first screen” impacted the revenue profitability of online content providers.<sup>35</sup> The current transaction between Comcast and Time Warner replicates this foreclosure constraint as Comcast will be able to leverage its X1 platform as the “first screen” of Time Warner customers and foreclose access by OVDs.<sup>36</sup>

Further, Comcast announced recently that it will have “a usage-based billing model rolled out across its footprint.”<sup>37</sup> This means that within the next few years, Comcast will roll out data caps across its entire footprint. Data caps have not been based on technological limits but on strategic decisions to favor some providers over others.<sup>38</sup> As one news story explains:

Comcast justified its decision [of discriminating in favor of its own service] by suggesting at first that the Xfinity content was a streaming-video option exempt from Open Internet considerations. Net neutrality principles didn’t apply here, Comcast argued, because in this case it controls the entire content-distribution chain.<sup>39</sup>

The proposed merger would enhance the competitive harm caused by discriminatory data caps by dramatically expanding their reach, thereby limiting consumer choice and access to over the top content.

The Applicants claim that it would be irrational and unwise for the merged firm to engage in anticompetitive behavior that harms the customer experience, because customers would switch to other alternatives.<sup>40</sup> This claim is belied by customer behavior and the absence

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<sup>35</sup> *Supra* 17, 10 ¶ 25.

<sup>36</sup> For example, earlier this year Comcast blocked HBO Go on Roku. *See* Karl Bode, *Comcast Still Blocking HBO Go On Roku (And Now Playstation 3), Incapable Of Explaining Why*, Techdirt (Mar. 7, 2014, 9:19AM), <https://www.techdirt.com/articles/20140305/14254626446/comcast-still-blocking-hbo-go-roku-now-playstation-3-incapable-explaining-why.shtml>. *See also* Comments of Roku, Inc., In the Matter of Applications of Comcast Corporation and Time Warner Cable Inc., FCC, MB Docket No. 14-57 (Aug. 25, 2014) at 2 (“[W]hile Time-Warner has authenticated the HBO Go app and the Showtime Anytime app on Roku’s platform, Comcast has not authenticated either app.”).

<sup>37</sup> James O’Toole, *Comcast plans data limits for all customers*, CNN Money (May 15, 2014), <http://money.cnn.com/2014/05/15/technology/comcast-data-limits/>.

<sup>38</sup> Matt Wood, *Comcast has some Xplaining to do*, CNET (Apr. 5, 2012), <http://www.cnet.com/news/comcast-has-some-xplaining-to-do/>.

<sup>39</sup> *Id.*

<sup>40</sup> Comcast-TWC Public Interest Statement, *supra* note 1 at 44.

of alternatives. As Chairman Wheeler explained, “Once consumers choose a broadband provider, they face high switching costs that include early-termination fees, and equipment rental fees. And, if those disincentives to competition weren’t enough, the media is full of stories of consumers’ struggles to get ISPs to allow them to drop service.”<sup>41</sup> As a result, Chairman Wheeler concluded that “the marketplace may not be offering consumers competitive opportunities to change providers, especially once they’ve signed up with a provider in the first place.”<sup>42</sup>

### **III. The Applicants’ Claimed Efficiencies Are Not Merger Specific and Do Not Outweigh the Merger’s Potential Harm**

The 2010 Merger Guidelines explain that “[c]ognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.”<sup>43</sup> Comcast and Time Warner claim efficiencies from the merger that overcome any anti-competitive effect of the merger. However, the efficiencies (economies of scale, costs, and operating efficiencies) that Comcast and Time Warner claim in the current transaction are ephemeral and not merger specific.

Comcast argues that the expanded geographic scale of the company would increase efficiency.<sup>44</sup> However, economies of scale may be illusory. While the Applicants have told the Commission that the proposed transaction would result in scale efficiencies in the form of cost savings, they have suggested the opposite to investors. Comcast executives have stated “[w]e don’t particularly believe that adding a couple million more customers to our footprint is going to change dynamics around content costs.”<sup>45</sup> In a conference call to reporters, a Comcast Executive Vice President explained, “[w]e’re certainly not promising that customer bills are going to go

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<sup>41</sup> Wheeler, *supra* note 4 at 4.

<sup>42</sup> *Id.*

<sup>43</sup> 2010 Horizontal Merger Guidelines § 10. For similar FCC treatment, *see e.g., In re Applications of AT&T Inc. and Deutsche Telecom AG*, 26 F.C.C.R. 16184, 16248 (2011).

<sup>44</sup> Rosston Topper Decl., *supra* note 29 ¶ 5.

<sup>45</sup> *Transcript of Goldman Sachs Communacopia Conference* at 14 (Sept. 24, 2013), cited in Statement in Opposition by Senator Al Franken, In re Applications of Comcast Corporation and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, FCC, MB Docket No. 14-57 (Aug. 25, 2014) at 12 [hereinafter Franken Statement].

down, or even that they're going to increase less rapidly."<sup>46</sup> Thus, there would be no pass through of cost savings to consumers.<sup>47</sup>

Statements by Comcast's CEO cast serious doubt on whether increasing Comcast's already massive scale will result in efficiencies that improve the quality of service available to consumers.<sup>48</sup> He has stated, "What unfortunately happens is we have about . . . 350 million interactions with consumers a year, between phone calls and truck calls. It may be over 400 million and that doesn't count any online interactions which I think is over a billion. You get one-tenth of one-percent bad experience, that's a lot of people – unacceptable."<sup>49</sup> Consumers feel the same way about the quality of Comcast and Time Warner service as Comcast's CEO does. The American Customer Satisfaction Index ranked Comcast and Time Warner *last* in a list of forty-three industries – which makes them the worst of the worst companies in terms of customer satisfaction.<sup>50</sup>

The Applicants' claimed operating efficiencies are not merger specific and could be undertaken without the merger. Comcast has promised to improve Time Warner's quality. However, Time Warner could undertake these investments short of a merger, including such claimed efficiencies as adding additional WiFi access points,<sup>51</sup> upgrading infrastructure,<sup>52</sup>

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<sup>46</sup> *Transcript of Comcast/Time Warner Cable Conference Call with Reporters* at 16 (Feb. 13, 2014) at 6, cited in Franken Statement.

<sup>47</sup> Franken Statement, *supra* note 45 at 6.

<sup>48</sup> Tim Cushing, *Comcast CEO Thinks Its Customer Service Problem Is Mostly A Matter Of Scale*, Techdirt (Dec. 5, 2013, 5:43AM) <https://www.techdirt.com/articles/20131202/04583725425/comcast-ceo-thinks-its-customer-service-problem-is-mostly-matter-scale.shtml>.

<sup>49</sup> Kai Ryssdal, *Comcast CEO: "We reinvent ourselves every couple years,"* Marketplace, (Nov. 21, 2013) <http://www.marketplace.org/topics/business/corner-office/comcast-ceo-we-reinvent-ourselves-every-couple-years>.

<sup>50</sup> ACSI Telecommunications and Information Report (2014) at 2, <http://www.theacsi.org/news-and-resources/customer-satisfaction-reports/reports-2014/acsi-telecommunications-and-information-report-2014> ("Time Warner Cable lags behind the entire industry following its second consecutive yearly decline, down 7% to an all-time low of 56. The combination of low and downward-trending customer satisfaction for both Comcast and Time Warner Cable is cause for concern amid merger talks between the two companies.").

<sup>51</sup> Rosston Topper Decl., *supra* note 29 ¶ 5; *see also id.* ¶¶ 7-19; Public Interest Statement of Comcast Corp. and Charter Comm., Inc., In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations, FCC, MB Docket No. 14-57 (June 5, 2014) at 6-10.

augmenting advanced services,<sup>53</sup> or increasing diversity and accessibility.<sup>54</sup> Many of the other investments and innovations are difficult to verify.<sup>55</sup>

#### **IV. Behavioral Remedies Are Insufficient to Promote Competition and the Public Interest**

If consummated, the proposed merger would give Comcast both enhanced incentive and ability to exercise its market power against online video distributors. This harm cannot be prevented through conduct remedies. Therefore, the merger should be blocked.

Comcast and Time Warner could use their leverage against OVDs to foreclose competition in a number of anti-competitive ways. As a broadband Internet service provider, Comcast has a gatekeeper role that allows it to exclude content providers and to privilege its own content. The merger would give it enhanced power and lots of ways to use exclusionary practices to foreclose opportunities from downstream competitors. Comcast would have a vastly bigger footprint from which to charge for interconnection, or clog capacity and routes to create issues of congestion for OVDs. Comcast would have an even larger network infrastructure to create preferences for its own content and harm competing offerings through data caps and set top box restrictions. To prevent competition, Comcast could subject OVDs to particularly low monthly data caps while continuing to allow Comcast's service to be exempted from such caps. Similarly, Comcast could decide to favor its own set top box and prevent delivery of its MVPD service over the set top boxes of its rivals such as Apple and Google.<sup>56</sup>

While a conduct remedy might try to address some of these issues, there is no way to predict now the many other ways in which a post-merger Comcast could marginalize existing or future rivals going forward. Further, conduct remedies, by their nature, expire. Given the high barriers to entry in broadband that Chairman Wheeler noted, it is highly unlikely that by the time

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<sup>52</sup> Rosston Topper Decl., *supra* note 29 ¶¶ 10-11.

<sup>53</sup> Comcast-TWC Public Interest Statement, *supra* note 1, at 71-72.

<sup>54</sup> *Id.* at 59-66, 106-26.

<sup>55</sup> Rosston Topper Decl., *supra* note 29 ¶¶ 13-14.

<sup>56</sup> Brad Reed, *Comcast could screw up Apple's Apple TV ambitions*, BGR (Feb 17, 2014), <http://bgr.com/2014/02/17/apple-tv-time-warner-cable-deal/> ("From the sound of things, Comcast is not at all keen about the idea of Apple, Google and other tech companies disrupting its own very lucrative pay TV business and it will push out its own product in an effort to beat them at their own game."); Connie Guglielmo, *Why the Apple TV Sequel, Expected in 2014, May Now Face A Tricky Debut*, Forbes (Feb. 13, 2014), <http://www.forbes.com/sites/connieguglielmo/2014/02/13/why-the-appletv-sequel-expected-in-2014-may-now-face-a-tricky-debut/>.

the conditions expire the market would have changed such that the combined entity's incentives and ability would be any different than they are today.

The closest historical example of such a constellation of power and incentive are the AT&T cases, where the company used a variety of means for curtailing competition from the new long distance carriers. The history with the Ma Bell telephone monopoly suggests that behavioral remedies are inadequate to address an ever-shifting set of anti-competitive practices that regulation via consent decree cannot easily foresee or forestall. The District Court found that the AT&T monopoly had excluded its rivals by denying access to AT&T's local telephony network.<sup>57</sup> AT&T was able to use its monopoly in the markets in which it was unregulated against its rivals that sought interconnection with the regulated local telephone monopoly.<sup>58</sup> Additionally, AT&T was able to foreclose competition in telephone equipment offered by AT&T competitors. Ultimately, antitrust enforcers decided that a structural break up with divestitures was essential to protect competition.<sup>59</sup> No set of regulatory or antitrust enforcement behavioral remedies could fix the anti-competitive conduct of AT&T or predict the future ways in which that conduct would occur.<sup>60</sup>

Merger control allows for the ex-ante prevention of anti-competitive conduct. Section 7 of the Clayton Act "reflect[s] the congressional intent that merger enforcement should interdict competitive problems in their incipiency."<sup>61</sup> Because of the vast variety of means Comcast would have post-merger to harm competition, and the new ways that could arise as the market continues to evolve, behavioral remedies cannot be relied upon to fix the particular competitive problems that the current proposed merger creates. The merger should be blocked in its entirety.

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<sup>57</sup> *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (entering a consent decree that required divestitures).

<sup>58</sup> *Id.*

<sup>59</sup> *Competitive Impact Statement on Settlement with AT&T*, 1052 ANTITRUST & TRADE REG. REP. (BNA) 401 (1982).

<sup>60</sup> *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 167 (D.D.C. 1982) ("There is evidence which suggests that AT&T's pattern during the last thirty years has been to shift from one anticompetitive activity to another, as various alternatives were foreclosed through the action of regulators or the courts or as a result of technological development. In view of this background, it is unlikely that, realistically, an injunction could be drafted that would be both sufficiently detailed to bar specific anticompetitive conduct yet sufficiently broad to prevent the various conceivable kinds of behavior that AT&T might employ in the future.").

<sup>61</sup> Horizontal Merger Guidelines at §1.

## V. Conclusion

Section 7 of the Clayton Act expressly prohibits mergers or acquisitions that “may be substantially to lessen competition, or to tend to create a monopoly.”<sup>62</sup> Similarly, the Commission may act in the public interest to block a merger that would enhance the ability of a merged firm to exercise its market power to the detriment of consumers.<sup>63</sup> To protect competition and consumers, we urge the Commission, and the Department of Justice, to block the merger.

Signed,

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<sup>62</sup> 15 U.S.C. § 18.

<sup>63</sup> *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc.*, 14 F.C.C.R. 14712, 14738 ¶ 49 (1999) (vacated on other grounds by *Association of Commc’ns Enters. v. F.C.C.*, 235 F.3d 662, (D.D.C. 2001)); *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations for MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee*, 15 F.C.C.R. 9816, 9821 ¶ 10 (2000).

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